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UNFAIR COMPETITION BY CONTROLLING RESALE PRICE OF GOODS. —The recent case of *Federal Trade Commission* v. *Beech Nut Packing Co.*[1] raised the interesting question whether the control of the resale price of an article by a manufacturer, who worked in collusion with wholesalers and retailers amounted to unfair competition within the meaning of section 5 of the Federal Trade Commission Act.[2] In this case it *appeared* that the defendant, a food manufacturing company, attempted to control the resale price of its products by a refusal to sell to wholesalers, jobbers and retailers who sold the products under a certain price. Those distributors not maintaining the fixed retail price were subject to be reported by special agents of the defendant or by other dealers, and to be enrolled upon a list of price cutters to whom goods would not be sold until their records were cleared by means of satisfactory assurances that they would not again resell the products except at "suggested" prices, and would refuse to sell to distributors who did not maintain such prices. Defendant also utilized symbols marked on its products in order to determine who

[1] 42 Sup. Ct. 150 (1922).
[2] United States Compiled Statutes (1916), § 8836e.

were not selling defendant's products at the "suggested" prices. This was held to be unfair competition within the meaning of the Federal Trade Commission Act. It was further held that an injunction would issue to restrain defendant from: (1) reporting the names of dealers who did not observe the fixed resale price, (2) causing such dealers to be enrolled as undesirables who were not to be supplied with the articles of the defendant until they had given satisfactory assurances that they would observe the fixed price; (3) employing salesmen and agents to report those underselling; (4) utilizing symbols to discover what distributors sold the products for less than the fixed resale price; (5) and utilizing any other means of accomplishing the maintenance of fixed resale prices.

This case marks the extreme limit taken by the courts in defining unfair competition.[3] The term usually means some deception or unfair method practiced by one competitor at the expense of another; as for example, underselling the latter or representing the latter's goods as being those of the unscrupulous competitor. No case can be found which goes to the length of holding that a mere restriction upon competition, as was the situation in the instant case, amounts to *unfair competition.*[4]

The purpose of the Act, undoubtedly was to prevent unfair methods of competition by corporations, partnerships or individuals. In this case, however, it would seem that no unfair methods of competition were practiced; but, as pointed out in the dissenting opinion of Justice Holmes,[5] "The worst that can be said, so far as I see, is that it hinders competition among those who purchase from it." According to this view, unfair competition was not practiced but competition was prevented among the distributors of the product. It becomes then a question not of what amounts to unfair practices but as to whether or not the acts done effected a combination in restraint of trade, and hence illegal on that ground.

The court throughout its opinion seems to have regarded the agreement as a combination in restraint of trade. This conclusion is strengthened by the fact that the court constantly referred to the Sherman Anti-Trust Act, and cited several cases decided thereunder. Indeed the court says: "The Sherman Act is not involved here except in so far as it shows a declaration of public

[3] See excellent discussion as to what is meant by "unfair competition" in the dissenting opinion of Mr. Justice Brandeis in Federal Trade Commission *v.* Gratz, 253 U. S. 421, 429 (1920).

[4] See 4 Words and Phrases (Second Series) 1066ff for definitions of unfair competition.

[5] 42 Sup. Ct. 156 (1922). See also the dissenting opinion of Justice McReynolds, who says in part: "Under the circumstances disclosed, constraint upon the freedom of merchants can only result from withholding trade relations or threatening so to do. These, when acting alone, respondent may assume or decline at pleasure, there being neither monopoly nor attempt to monopolize. And the exercise of this right does not become an unfair method of competition merely because some dealers cannot obtain goods which they desire, and others may be deterred from selling at reduced prices."

policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress."[6] Thus, although the case was prosecuted and decided under the Federal Trade Commission Act, the principle of the Sherman Act would seem to be the sound one upon which to base the decision.

Both upon reason and authority it seems clear that the acts of the defendant in the instant case amounted to a restraint of trade and were therefore illegal as opposed to public policy and the Sherman Anti-Trust Act.[7] It is settled that *contracts* with distributors not to resell the products of the manufacturer except at a fixed price are illegal as being in restraint of trade under the Sherman Act.[8] It was also decided, in the case of *United States* v. *Colgate & Co.*,[9] that a manufacturer who simply refuses to sell to dealers is not guilty of violating the Sherman Act, and that he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. But the doctrine of the Colgate case must be strictly confined to the facts as set forth in that case, as it seems to be materially restricted by the law as declared in the case under discussion.[10] To take any further steps than the mere *refusal* to sell to those who refuse to resell at the fixed resale price may amount to an act in restraint of trade and hence be illegal. And it seems clear that whenever any plan or combination, whether by express contract or implied agreement, restrains trade by controlling the resale price of a product, it is illegal as a combination in restraint of trade.[11]

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[6] 42 Sup. Ct. 154 (1922).

[7] See valuable note as to the right of manufacturer to control the resale price of his products in 7 A. L. R. 449.

[8] Dr. Miles Medical Co. *v.* John D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376 (1911); United States *v.* A. Schrader's Son, 252 U. S. 85 (1920); United States *v.* Kellogg Toasted Corn Flake Co., 222 Fed. 725, Ann. Cas. 1916A, 78, and note (1915).

[9] 250 U. S. 300, 39 Sup. Ct. 465, 7 A. L. R. 413.

[10] Federal Trade Commission *v.* Beech Nut Packing Co., 42 Sup. Ct. 150 (1922).

[11] Frey & Son, Inc. *v.* Cudahy Packing Co., 41 Sup. Ct. 451 (1921). By way of *dictum*, the court said, in United States *v.* Schrader's Son, 252 U. S. 85, 99, 100 (1920): "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation upon the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States." The reasoning of the court in John D. Park & Sons Co. *v.* Samuel B. Hartman, 153 Fed. 24, 42 (1907) is also pertinent here. It said: "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come within complainant's

Upon this ground the decision in the instant case could be soundly based. The purpose of the plan was to keep up the price of the article and thus to restrain trade to that extent. This was done by what practically amounted to an implied combination. The result of the decision appears correct but the reasoning of the court is not clear, and probably unsound, as not clearly distinguishing as to whether the ground of the decision was that the practices complained of amounted to "unfair competition", or effected a combination in restraint of trade. Both upon principle and authority, it would seem that the latter principle should have controlled the court in its decision of the case.

F. W. D.

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MAY VESSELS WHICH COMMITTED TORTS WHILE IN THE HANDS OF THE GOVERNMENT BE LIBELLED THEREFOR AFTER RETURN TO PRIVATE OWNER?—During the recent war, many privately owned vessels were loaned to the government for use during the hostilities. Some of these vessels committed torts, for which they would have been liable in admiralty save for the exemption of the government from suit. These vessels have now been returned to private owners, and the question arises whether or not the parties injured by them may now sue for those torts.

In answering this question we must first consider the nature of the admiralty law. From the earliest times there has been a law of the sea. This law is separate and distinct from all recognized codes. It was not formed by any one nation, nor did it grow from the usages of any one people. It developed gradually from the maritime commerce of the civilized world and is today enforced in every commercial nation which touches upon the sea. It may vary, it is true, in its less important details, but in its essential doctrines it is universal. We have adopted that law in the United States.[1] The admiralty clause in our constitution gives our Federal Courts jurisdiction over it.[2] And all through our judicial

license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about". And, of course, when such a combination is effected by other means than contracts, the effect is the same and is illegal for the same reasons. It then becomes a matter of fact in each case to determine whether or not the acts done effect a combination, express or implied, in restraint of trade.

[1] *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654 (1874); and see HUGHES, ADMIRALTY (2nd ed.) § 1.

[2] *The Lottawanna*, *supra*.